

*Comparative Study Prepared for the
Information Commissioner of Canada*

**FOREIGN CONSULTATIONS BY THE
DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL
TRADE IN CONJUNCTION WITH THE
*ACCESS TO INFORMATION ACT***

Paul-André Comeau
paul-andre.comeau@enap.ca

September 2010

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	3
ACKNOWLEDGEMENTS	6
INTRODUCTION	7
ACCESS TO INFORMATION AND FOREIGN CONSULTATIONS.....	9
FOREIGN CONSULTATION SYSTEM.....	11
FOREIGN CONSULTATIONS CONDUCTED BY DFAIT.....	14
COMPARISON TARGETS.....	24
FOREIGN CONSULTATIONS BY TARGET COUNTRIES	26
1. Legislative and regulatory framework.....	26
2. Consultation practices.....	28
FINDINGS AND COMPARISON	32
AVENUES FOR CONSIDERATION	34
APPENDIX	38
ACCESS TO INFORMATION REGULATIONS OF TARGET COUNTRIES	38
BIBLIOGRAPHY.....	42
LIST OF TABLES	43
LIST OF FIGURES	44

EXECUTIVE SUMMARY

The Department of Foreign Affairs and International Trade (DFAIT) is having serious difficulty fulfilling its access to information obligations within the time limits imposed by the *Access to Information Act*. In her report entitled *Out of Time*, presented to Parliament this spring, the Information Commissioner notes, among other problem areas, the Department's consultations with foreign governments and international organizations for access requests it receives, as well as its consultations on behalf of a number of departments and agencies. Such consultations are initiated when the documents being sought may affect Canada's international relations or if the documents are from a foreign government or international organization.

This comparative study seeks primarily to understand the impact of these consultations, not only on how access is managed at DFAIT, but also on the departments and agencies that have to defer to the Department, pursuant to a Treasury Board Secretariat directive. It will also attempt to identify possible steps that DFAIT could consider to streamline the procedures put into place for this foreign consultation process.

Such consultations account for approximately 10% of all access files processed by DFAIT. Most of these consultations are conducted on behalf of federal departments and agencies. Of the access requests received by the Department, barely 3% are the subject of consultations.

The results of a summary examination of these consultations during the 2008–09 and 2009–10 fiscal years speak for themselves. For example, some 30 foreign governments were the subject of such consultations by Canada. The United States topped the list of countries receiving the most consultation requests. The average length of time it took to receive decisions from foreign governments was 83 and 151 days, respectively, for each of these two years. Of the consultations initiated in 2008–09, responses from foreign governments were, in June 2010, on average, 574 days overdue, or more than 19 months.

The consultation process is fraught with ramifications, not only for members of the public awaiting a response, but also for the Access to Information Division at DFAIT and such units in the other federal departments and agencies involved in this process. The cumulative delays invariably affect DFAIT's performance in access to information matters.

Five countries were chosen for comparison purposes with Canada in terms of how they deal with provisions governing international relations where document access requests are concerned. Such provisions are contained in access legislation in the United States, Australia, New Zealand, the United Kingdom and Mexico. These five countries have several constitutional and administrative traits in common with Canada, hence this comparative study.

There is no requirement in the legislation in any of these five countries or in Canada for such consultations to be initiated. Rather, it is an implicit concept arising from the obligation imposed on each of these countries to maintain good diplomatic relations with countries concerned by access requests. In Canada, a directive issued by the Treasury Board Secretariat confers upon DFAIT the exclusive mandate to initiate such consultations with foreign countries regarding access requests it receives, as well as consultations on behalf of other federal departments and agencies. These consultations, which are conducted through traditional diplomatic channels, are directed solely to the departments of external affairs of the countries concerned.

Two possible avenues for reducing the scope of the problem that has plagued DFAIT for several years now can be identified from this study, which focuses on the processes and procedures favoured by these five reference countries.

(1) The first avenue concerns the **technical side of the consultation process**. In view of practices of other departments of external affairs, consultation officials at DFAIT, in cooperation with their missions abroad, should identify the best gateway for soliciting consultations with other countries. Is it preferable to always use the habitual foreign affairs channel? In some cases, would it not be more efficient to direct such requests to the embassy of the country in question in the nation's capital? This question warrants consideration in the case of countries to which access requests have yet to be directed or which have received very few such requests in recent years. Such an approach could enhance relations between DFAIT and the embassies in question and even produce unexpected dividends.

Given the ever-increasing scope of the reciprocal consultations between Ottawa and Washington in access to information matters, consideration should be given to attempting to streamline the procedures in place. Access to information officials at the State Department and at DFAIT would benefit from initiating discussions in that regard.

On a more fundamental level, it would also be in DFAIT's interest to use the quickest channels it can for documents that its missions have to forward to departments of external affairs for consultation purposes. The possibility of sending such documents using the quickest diplomatic pouch for each destination post should be explored.

(2) The second avenue to be investigated involves a more thorough examination of **the practices in use at DFAIT for more than two decades and of the very principles underlying consultations with foreign governments**.

This consideration is warranted in view of the information gleaned concerning the practices in use in four of the countries chosen for comparison purposes. Consequently, the possibility that certain departments and agencies could engage consultations directly in other countries, subject to terms and conditions to be established, is conceivable. The departments in question would be ones that maintain significant and ongoing relations

with their foreign counterparts, departments or international organizations, through well-established relations and procedures.

Such an approach would also be in line with an option envisaged some time ago by the Treasury Board Secretariat: “Only when an established and acceptable system of liaison and consultation already exists should direct consultation take place. External Affairs should be kept informed of these channels of consultation.”¹ The UK Ministry of Justice, which plays a role similar to that of the Treasury Board Secretariat in matters of access to information, recently adopted this principle.

A two-tier procedure is conceivable. A department or agency would first have to establish for DFAIT the nature and significance of the relations maintained with its foreign counterparts. When an access request arises, the department or agency should provide DFAIT with the wording of the proposed foreign consultation and the rationale behind the anticipated decision. DFAIT would then have 10 working days to forward to the entity concerned its comments and suggestions, or even its categorical refusal.

Such an approach would streamline the consultation process and avoid delays incurred when documents are sent back and forth between Foreign Affairs in the two countries concerned. It would also reduce the lengthy delays under the current system.

This discussion should involve both DFAIT and the Treasury Board Secretariat in view of the latter’s responsibilities with regards to the implementation of the *Access to Information Act*.

These avenues and perspectives should also be of interest to the Information Commissioner. She could consider calling on her fellow commissioners in the other countries to study this issue and, in so doing, possibly jump-starting the move towards a common framework that would harmonize and streamline foreign consultations.

The overarching goal of these possible steps is to ensure that citizens have access to requested documents within a reasonable amount of time, in keeping with the provisions and spirit of the Act of 1982.

¹ Treasury Board Secretariat (1993). Chapter 2 – 7 (Exemptions - General), Section 9 (Consultation), Ottawa, December 1.

ACKNOWLEDGEMENTS

The author of this comparative study would like to sincerely thank the many people who agreed to answer his questions and, in so doing, generated a better understanding of the problem under study. The author would especially like to thank the following individuals.

Mexico: Jacqueline Peschard, IFAI President, and Lina Ornelas, Director General of Classified Information and Personal Data. International Relations Secretariat (SRE): Mercedes de Vega, manager of the Liaison Unit.

Australia: Professor John McMillan, Information Commissioner Designate. Department of Foreign Affairs and Trade (DFAT): John Scott and Dominic Trindade (Legal Branch).

New Zealand: Antonia Di Maio, Senior Business Advisor (Office of the Ombudsmen). Ministry of Foreign Affairs and Trade (MFAT): Tara Sewell, Solicitor (Legal Division).

United States: Melanie Ann Pustay, Director, Office of Information Policy, Department of Justice, and Nicholas Mulville Murphy, Senior Advisor, Office and Information Programs and Services, State Department.

United Kingdom: Graham Smith, Deputy Information Commissioner (OCI). Foreign and Commonwealth Office: Andrew Cronin, Head, Information Rights Team.

Library and Archives Canada: Daniel J. Caron, Deputy Minister; Gordon Browne, Director of Strategic Research; Paul Marsden, Archivist; and Suzan Franklin and Pierre Desrochers, Senior Research Analysts.

Department of Foreign Affairs and International Trade: Roxanne Dubé, Director General, Corporate Secretariat; and Monique McCulloch and Johanne Daigle, respectively Director and Deputy Director, Access to Information and Privacy Protection Division.

Lastly, the author would like to thank Oscar Lopez Arburola, Joséphine Dubois and Karine Prévost-Privat for their invaluable contribution.

INTRODUCTION

From coast to coast across Canada, reaction was fierce the day after publication of the access to information *Report Cards*² by the federal Information Commissioner. For example, the Halifax daily *The Chronicle Herald* was quick to call the Department of Foreign Affairs and International Trade (DFAIT) the “bad boy on the block.”³ According to a *Globe and Mail* columnist, the federal Information Commissioner, seeing the Department’s performance, even had to “create” a special off-the-charts “red alert” category for it.⁴ Greg Weston, of the daily *Ottawa Sun*, opined, “Not surprisingly ... Foreign Affairs has also been home to some of the most egregious waste and mismanagement of taxpayers’ money anywhere in government.”⁵ In *Le Devoir*, Manon Cornelier writes that, literally, “[Translation] the situation was allowed to fester.”⁶ Across the country, the tone was similar, with DFAIT’s handling of the *Access to Information Act* meeting with harsh criticism and even disillusionment.

Over the course of the past decade, the Department earned few kudos from the federal Information Commissioner in her reports to Parliament. This year, despite obvious improvements, DFAIT received the worst grade given out since the inception of the “report cards,” which assess, on a comparative basis, the performance of a number of departments and agencies as regards access to information. The Information Commissioner summed up the situation in no uncertain terms: “Foreign Affairs and International Trade Canada’s performance was so poor that the OIC could not rate it against its established criteria.”⁷

Year after year, DFAIT’s difficulty in fulfilling its obligations under the 1982 *Access to Information Act*⁸ has been examined in many different ways by officials of the Department and the Office of the Information Commissioner of Canada. The issue of DFAIT-led consultations with foreign governments and international organizations seeking their consent for the disclosure of documents requested under the Act has come into sharper focus in recent years. In her previous report, the Information Commissioner had noted a very significant increase in the number of access requests within the framework of this consultation procedure.⁹

² Information Commissioner of Canada (2010) – *Out of Time (2008 – 2009 Report Cards)*, Ottawa, 150 pages.

³ Rick Zemanek (2010) – “End the federal foot dragging,” *The Chronicle Herald*, Halifax, April 25, page S-5.

⁴ Lawrence Martin (2010). “In Ottawa, secrecy is the issue that keeps on giving,” *The Globe and Mail*, Toronto, April 15, page A-17.

⁵ Greg Weston (2010). “Access to nothing. Going ‘off-grid’ latest trick to avoid public scrutiny,” *Ottawa Sun*, Ottawa, April 15, p. 9.

⁶ Manon Cornelier (2010). “Information raréfiée,” *Le Devoir*, Montreal, April 14, page A-3.

⁷ Information Commissioner (2010) – See note 1; page 3

⁸ *Access to Information Act*, Chapter A-1.

⁹ Information Commissioner (2009). *Report Cards (2007 – 2008)*. Ottawa.

In actuality, what are the practical consequences of the use of this procedure? Is the Department beset with a monumental task, a sort of “mission impossible”? In what way are foreign consultations complicating the processing of access requests received by DFAIT? These concise questions are the foundation of this study, conducted at the request of the Information Commissioner.

This study will take a two-pronged approach, which, it is hoped, will help to narrow down the problem. First, it will seek to quantitatively measure the scope of the phenomenon of DFAIT’s foreign consultation process, and attempt to extrapolate its impact on the overall processing of access to information requests received by DFAIT. The findings of this exercise will then provide the basis for a comparison of how this aspect of access to information is handled in five other countries that also manage access to information legislation with similar requirements.

Besides contributing to an understanding of the issue of consultations with foreign governments and international organizations, this study will also attempt to propose possible steps for streamlining the process used by DFAIT in connection with one of the most complex constraints of the *Access to Information Act*. This endeavour clearly holds much promise, as the issue does not seem to have captured the attention of researchers or specialists, nor that of access to information oversight officials in countries where such a system of administrative transparency is in place.

ACCESS TO INFORMATION AND FOREIGN CONSULTATIONS

The question of consultations with foreign governments and international organizations is part of the overall issue of implementation of the *Access to Information Act*. It is, in fact, one of the problems that has been denounced in recent years by both the Information Commissioner and outside specialists. Globally, the Department is having serious difficulty meeting the requirements of the Act. For example, in 2008–09, the Department posted the poorest performance of any federal entity, with 163 days being the average time it took to complete access requests.

The decision by the Information Commissioner not to assign a grade to DFAIT for 2008–09 given the magnitude of the delays in responding to access requests is a telling indication of the challenges facing the Department's Access to Information and Privacy Protection Division. Over the last 10 years, 2002 was the only time when DFAIT received a satisfactory grade – a “B.”

DFAIT has to deal with a reality that makes it unique within the federal government. The rotation of career diplomats means that the Access to Information and Privacy Protection Division cannot count on specialists on a permanent or long-term basis. It is also in the “eye of the storm” when Canada is directly involved in “hot button,” major international files. The military intervention in Afghanistan has sparked Canadians' interest and concern and has led to a significant increase in requests for documents that would help to shed light on the meaning of the conflict. More specifically, according to its own data, the Department saw an average annual increase of 15.5% in access requests over the period from 2004 to the end of 2009.¹⁰

The Department has made various efforts to try to improve its performance and better meet Canadians' expectations. It recently gave Andrée Delagrave the mandate to review the situation. Ms. Delagrave has estimated that more than 40 new positions would need to be created to rectify the situation. Moreover, DFAIT is now in a race against time to eliminate the accumulated backlog in the processing of access requests, having hired some 10 contract staff.

Besides the increased number of access requests received by the Department, in justifying her call for additional funding, Ms. Delagrave cites the Department's unique mandate in the processing of requests for access to documents: it has to take charge of the requests that are made to various departments and agencies across the federal government and concern Canada's international relations.

The growth in this type of foreign consultations has been cited on a few occasions in the Department's reports to Parliament and singled out by the Information Commissioner. “Consultation requests have increased significantly in recent years, to the

¹⁰ Department of Foreign Affairs and International Trade (2010). *Annual Report to Parliament on the Administration of the Access to Information Act*, Ottawa, page 3.

point that they outnumber access requests,”¹¹ writes the Commissioner in her report entitled *Out of Time*, released in spring 2010. In its Report to Parliament submitted that same spring in compliance with the *Access to Information Act*, DFAIT is clear on the matter: “In fact, last year DFAIT processed even more requests for ATI consultations from OGDs (1039) than ATI requests for access to records under its control (665). This important role continues to put another heavy burden on the ATIP Division’s limited resources.”¹²

The problems posed by these consultations and especially the backlogs incurred under this procedure tend to explain in part the Department’s poor performance in administering the *Access to Information Act*. Both are contributing to the discontent of the departments and agencies that have to defer to DFAIT for all access requests for documents that could affect Canada’s international relations. The final blame for these backlogs has to be borne by these departments and agencies, which are then chastised by the public and have to include these backlogs in their annual performance results.

¹¹ Information Commissioner of Canada (2010). *Out of Time (Special Report to Parliament)*, Ottawa, p. 34.

¹² Department of Foreign Affairs and International Trade – *Annual Report to Parliament on the Administration of the Access to Information Act - 2008–09*. Online document, retrieved June 10, 2010: http://www.international.gc.ca/about-a_propos/atip-aiprp/parl0809_atia_lai.aspx?lang=eng.

FOREIGN CONSULTATION SYSTEM

The issue of consultations with foreign governments involves legal considerations and regulatory requirements. It is also coupled with administrative procedures, which ultimately give it a particular role in the access to information system as it is structured in Canada.

In virtually all access to information legislation, special treatment is given to requests for documents potentially impacting on the country's international relations. Canada is not immune to what is almost a rule. The object of the provisions established to that end is the maintenance of harmonious relations between countries and with international organizations. Questions of national security are also part of this concern.

In the legislation of 1982, provisions governing international relations, in the broad sense, are relatively well circumscribed. All documents communicated or entrusted to the Government of Canada by another government or an international organization are subject to an imperative exemption: they cannot be disclosed to a requester unless the government or organization in question explicitly consents to the disclosure (section 13). The government has discretionary authority as regards documents pertaining to issues of defence, national security, diplomatic correspondence with another country and international negotiations (section 15).

Parliament enacted a special procedure for reviews of decisions given under either of those two sections. In specifying (section 52) that the Chief Justice of the Federal Court may hear such applications for reviews, Parliament, in a way, is affirming the exceptional nature of these kinds of documents. The conditions for action by the Information Commissioner when called upon to investigate a complaint of that nature must be interpreted in exactly the same manner (section 59(2)).

It can no doubt be affirmed that the notion of consultation is implicit in the provision that allows the government – in fact, DFAIT – to disclose certain documents when consent has been given by the foreign country or international organization. The Department has developed an entire set of procedures to deal with this aspect of processing access requests made directly to it.

The consultation system, which is exactly what is at issue, has in fact been expanded under a regulation issued by the Treasury Board Secretariat more than 17 years ago.¹³ Under that regulation, any department or agency that receives an access request concerning any aspect of international relations must defer to DFAIT. This department alone has the authority to decide whether to take steps in that regard with another government or international organization. That prerogative was also clearly reaffirmed by

¹³ Treasury Board Secretariat (1993) – *Access to Information and Privacy, Exemptions - General*, Ottawa: para. 9.

the Department following a request from the Department of National Defence, which, in 1997, wanted to deal directly with its counterpart in the United States.¹⁴

DFAIT does not initiate foreign consultations until it has conducted a detailed review of requests for documents whose impact on Canada's international relations is considered a serious possibility. These files are therefore screened according to very specific criteria that are codified in procedures followed by staff of the Access to Information and Privacy Protection Division.¹⁵ Consequently, DFAIT does not consult certain governments on account of the presumptive attitude of these countries.¹⁶

DFAIT engages in foreign consultations in respect not only of access to information requests made directly to it, but also of requests from other departments and agencies. Conversely, it is approached by foreign governments that also have access to information structures containing provisions governing the status of international relations.

In fact, the foreign consultations process is coupled with another obligation that DFAIT must fulfil under the same Treasury Board Secretariat directive, but this time with regard to the *Privacy Act*.¹⁷ Acting under the same objective, i.e., maintaining harmonious relations with other countries and/or international organizations, the Department can therefore decide to initiate foreign consultations in respect of personal information. This procedure applies not only to requests for personal information made to the Department, but also to files from other departments and agencies.

This process is relatively complex. It involves a significant number of players whose actions correspond in fact to the different stages in the consultation process. It can be illustrated as follows (Figure 1).

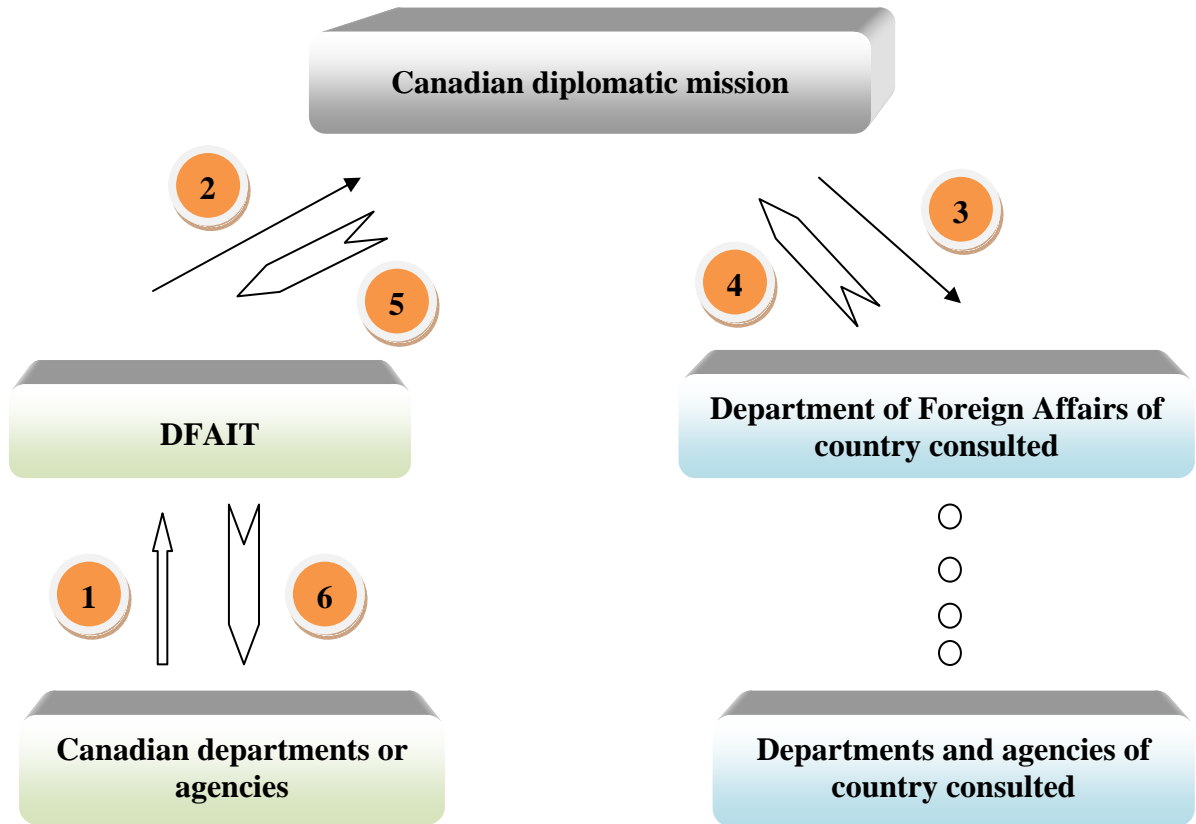
¹⁴ Internal memorandum signed on December 22, 1997, by Michael C. Welsh, Director, U.S. General Relations Division. "We believe that this proposal would significantly erode DFAIT's responsibility for pursuing, on behalf of all government departments, consultation with the U.S. prior to the release of documents which could be expected to be injurious to the conduct of international relations."

¹⁵ Pending.

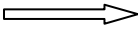
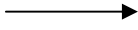
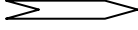

¹⁶ "Some foreign governments, such as China, India, Korea and perhaps others, may object to being consulted on their records. They consider that the information was given in confidence and should remain confidential." Internal DFAIT document. *Reference document: Annex H, Copy of study conducted re: sections 13 and 15.*

¹⁷ *Privacy Act*, R.S.C. 1985, ch. P-21.

FIGURE 1
Steps in Consultations Conducted by DFAIT
With Foreign Governments on Behalf of Departments and Agencies



Legend:

-  Initial consultation
-  Communication of consultation request
-  Result of consultation
-  Opportunity to consult

In short, this is a major and relatively onerous task performed by DFAIT on behalf of all the entities of the Government of Canada.

FOREIGN CONSULTATIONS CONDUCTED BY DFAIT

The model is therefore in place. It has been fine-tuned over the years by the various managers of the Access to Information Division. The findings of the Information Commissioner in her report *Out of Time* beg the question: what exactly are the ramifications of the burden of DFAIT's consultations with other countries and international organizations?

In terms of access to information, the consultations incumbent upon DFAIT greatly exceed the huge number of access to information requests it receives. With regard to consultations initiated on behalf of other departments and agencies, in an average year, foreign consultations account for approximately 10% of all files processed by DFAIT (Tables 1 and 2).¹⁸ Of this number, a significant portion can be attributed to DFAIT's obligations under the Act itself and the Treasury Board directive concerning the potential impact of access requests on Canada's international relations.¹⁹

TABLE 1
Relative Weight of DFAIT's Foreign Consultations in the Administration of the
Access to Information Act (2008–09)

	Files Processed by DFAIT	Files Processed for Departments and Agencies	Relative Weight of All Consultations
Total requests	665	1,039	1,704
Foreign consultations	21	143	164
% of total volume	3%	14%	9.6%

¹⁸ The data used in this section were gleaned from documents made available to the researcher by DFAIT's Access to Information and Privacy Protection Division. They concern the last two fiscal years, i.e., 2008–09 and 2009–10.

¹⁹ Excluding steps taken under the *Privacy Act*.

TABLE 2
Relative Weight of DFAIT's Foreign Consultations in the Administration of the
Access to Information Act (2009–10)

	Files Processed by DFAIT	Files Processed for Departments and Agencies	Relative Weight of All Consultations
Total requests	638	812	1,450
Foreign consultations	18	117	135
% of total volume	2.8%	14.5%	9.3%

On behalf of other departments and agencies, DFAIT each year consults with some 30 governments in order to obtain their opinion on the disclosure to requesters of documents concerning them in one way or another. One thing is certain from a quick glance at Tables 3 and 4: the majority of these consultations involve the United States, and, to a lesser degree, the United Kingdom, Australia and New Zealand.

TABLE 3
Consultations in 2008–09 by DFAIT with Various Countries on Behalf of Canadian
Departments and Agencies

Countries	Decisions Received	Average Length of Time (Days)	Pending	Average Length of Time (Days)
Algeria	2	286		
Argentina			2	756
Australia	6	60		
Barbados			1	761
Belgium			1	668
Bulgaria			2	760
Burkina Faso			1	763
Denmark	1	94		
Egypt			2	576
France	2	157		
Germany	1	98	2	490
India			1	763
Israel	1	111		
Italy			1	374
Japan			1	348
Latvia	1	79		
Malaysia	2	50		
Mexico	1	119	3	424
Netherlands	1	128		
New Zealand	2	95	1	716
Portugal			1	293
Romania	2	212		
Russia			1	598
Serbia	1	36		
South Africa	1	121		
Sweden	1	43		
Syria	1	183	1	360
Thailand	1	2		
United Kingdom	3	120	7	559
United States	10	361	53	537

TABLE 4
Consultations in 2009–10 by DFAIT with Various Countries on Behalf of Canadian
Departments and Agencies

Country	Decisions Received	Average Length of Time (days)	Files Pending	Average Length of Time (days)
Abu Dhabi			1	354
Australia	4	73	1	384
Brazil			4	80
France	2	30	2	122
Germany	1	70	2	106
Greece			1	210
Haiti			1	215
India	1	15		
Israel	1	108	1	340
Japan			2	131
Kenya			3	93
Korea	1	55		
Lithuania			1	70
Mali			1	95
Mexico			1	129
Netherlands			2	113
New Zealand	5	114	1	716
Norway	1	61		
Singapore	1	48		
South Africa	1	121		
Spain			1	210
Sweden			1	91
Switzerland			1	425
Trinidad and Tobago			1	18
United Kingdom			6	200
United States	3	105	53	207
Uruguay	1	111		

The vast majority of these consultations on behalf of departments and agencies involved the Government of the United States and were directed more specifically to the State Department.

Consultations with international organizations on behalf of other entities of the Government of Canada mostly involved members of the United Nations system (Table 5).

TABLE 5
Consultations by DFAIT with International Organizations on Behalf of
Departments and Agencies in 2008-09 and 2009-10

Period	International Organizations	Decisions Received	Average Length of Time (days)	Files Pending	Average Length of Time (Days)
2008-09	Afghanistan Reconstruction Trust Fund	1	78		
	European Union			3	581
	ICAO	1	20	1	648
	International Telecommunication Union (ITU)	1	187	1	615
	NATO			1	741
	OECD	2	63	3	567
	Office of the High Commissioner for Human Rights	1	14		
	UN	4	95	2	499
	WHO			2	606
2009-10	Afghanistan Reconstruction Trust Fund			1	139
	European Union			6	136
	Global Polio Eradication Initiative			1	243
	Haiti Reconstruction Fund			1	33
	IAEA	2	36		
	International Joint Commission (Great Lakes)			1	202
	OECD			2	221
	UN	1	25	1	180
	UNEP			1	143
WHO			1	133	

The numbers could not be clearer: the time taken in consultations with foreign governments and international organizations on behalf of departments and agencies is considerable.

In actuality, barely some 10 countries and a few international organizations were approached by DFAIT following access requests made directly to it throughout the year (Tables 6 and 7). Once again, most of the requests were directed to the US government.

TABLE 6
Consultations with Various Countries
Following Access Requests Received by DFAIT

Period	Country	Files Completed	Average Length of Time (Days)	Files Pending	Average Length of Time (Days)
2008-09	Brazil			1	313
	Cambodia	1	37		
	France	1	28		
	Italy	1	27		
	Jamaica	1	95		
	Netherlands	1	37		
	Poland	1	96		
	Romania			1	550
	Santo Domingo			1	502
	Trinidad and Tobago			1	440
	United States	1	84	5	145
2009-10	Austria			1	80
	Brazil			1	76
	France	1	20		
	Israel			1	235
	Japan			1	76
	Singapore	1	76		
	Switzerland	1	158		
	United States	1	200	5	175

TABLE 7
Consultations with International Organizations
Following Requests Received by DFAIT

Period	International Organizations	Decisions Received	Average Length of Time (Days)	Files Pending	Average Length of Time (Days)
2008-09	Commission for Environmental Cooperation	1	14		
	European Union	1	41		
	OECD	2	41		
	UN	1	133		
2009-10 ²⁰	European Union			2	47
	ICAO	1	200		
	UNRWA			1	235

In these last two tables, the length of time reported is significant. Very few files are completed in less than 15 days. Generally, many months elapse before Ottawa receives a decision from the government consulted on a file.

By agglomerating the data on consultations conducted with foreign governments on behalf of other departments and agencies in 2008–09 and 2009–10, one has a better understanding of the significance and impact of this process, which takes place through traditional diplomatic channels. From the data recorded over the last two fiscal years, one can easily see the burden of the time factor in this process:

- (1) The average length of time for Ottawa to receive a decision from a foreign government ranged from 83 to 181 days during the two years under review (Tables 8 and 9).
- (2) In 2008–09, the length of time since the start of the consultation process was 574 days, i.e., more than 15 months.
- (3) A significant number of the files involved in this procedure during 2009–10 were already overdue by more than six months.

²⁰ Decisions received or requested between January 1 and June 6, 2010.

TABLE 8
Average Length of Time Taken to Receive Files Submitted to Foreign Countries on
Behalf of Other Departments and Agencies (2008–09)

	Decisions Received	Files Pending
Files submitted for consultation	39	N: 81
Length of consultations (days)	7,063	46,548
Average length of time (days)	181	574

TABLE 9
Average Length of Time Taken to Receive Files Submitted to Foreign Countries on
Behalf of Other Departments and Agencies (2009–10)

	Decisions Received	Files Pending
Files submitted for consultation	22	87
Length of consultations (days)	1,826	16,971
Average length of time (days)	83	195

Lastly, Canada is also consulted by foreign governments that also have access to information systems. Their legislation also seeks to prevent prejudice to international relations between countries. The number of such consultations is relatively low, however. Overall, the response time reported by DFAIT ranged from 90 to 105 days (Table 10).

**Table 10
Consultations by Various Countries with DFAIT**

Period	Country	Files Forwarded	Average Response Time by DFAIT (Days)	Files Pending	Response Time (Days)
2008–09	Australia	5	104		
	United States	4	108		
2009–10	Australia	6	71		
	Denmark	1	35		
	United Kingdom	8	92		
	United States	10	107	3	75

#

#

#

A few significant findings emerge from this cursory review of the consultations conducted by DFAIT in processing access requests made to it and in acting on behalf of other departments and agencies.

Of the some 1,450 access requests handled by DFAIT (see Table 1, page 15), the latter directly completes nearly 90%. The Access to Information Division handles this function, in accordance with the *Access to Information Act* and the procedures put into place over the years. In her study, Ms. Delagrave clearly noted the problems encountered by DFAIT in that regard. Furthermore, she proposed that new resources be added with a view, hopefully, to improving the Department's performance.

In addition, the complexity of the consultation system compounds DFAIT's work as regards access to information, even though this procedure applies to just 10% of all access and consultation requests.

The impact of the consultation process is unquestionably significant, not only for members of the public awaiting a response, but also for the access to information divisions at DFAIT and similar units in federal departments and agencies. Response times are gauged in half-years at least, hence the departments' and agencies' dissatisfaction and disgruntlement.

These affirmations must of course be put into perspective to further study the effects of foreign consultation practices on DFAIT's performance in processing access requests that involve foreign consultations. This objective can be achieved by comparing these data with the procedures of, and the results obtained by, other countries where access to information is enshrined in legislation and the objective of administrative transparency.

COMPARISON TARGETS

While all comparisons involve arbitrary aspects, they are focused on achieving consistency in information. The current study is true to that premise in its comparison of foreign consultations relating to access to information requests engaged by the U.S., Australia, New Zealand, the United Kingdom and Mexico.²¹

Access to information practices of the five countries may be divided into two separate categories. The U.S. (1966), New Zealand (1982) and Australia (1982) were among the first countries, as was Canada (1982), to implement legislative regulations on access to information. These countries have therefore gained very significant experience in that regard. The United Kingdom and Mexico have only recently joined the group, about a decade ago, with the push towards greater administrative transparency. Not only is their respective legislation part of the new movement in which new information technologies play a fundamental role, but it is also in keeping with trends in governance and accountability that have gained ground over the last two decades.

Interesting analogies may be drawn between Canada and the five North American and Oceania countries. As in Canada, two of them, New Zealand and Australia, have parliamentary systems that have been heavily influenced by the centuries-old British Westminster model, therefore inviting closer comparison. At the same time, the U.S., which invented the genre, practises federalism, as do Australia, Mexico and Canada.

The comparative approach taken therefore complies, to a significant degree, with the principles that govern this type of study and helps justify conclusions and analogies likely to shed a different, and brighter, light on the basic problem being studied: the impact of foreign consultations on DFAIT's handling of access to information requests. The following diagram illustrates the fundamental characteristics of each country's access to information regulations and provides a basis for understanding and evaluating their foreign consultation practices.

All five countries have access to information laws and regulations similar to those in force in Canada since 1982. The number of access to information requests submitted to their respective foreign affairs departments is clearly differentiated (Table 11).

²¹ A summary description of access to information regulations in all five countries is provided in the appendix (pages 38-41).

TABLE 11
Access to Information Requests
(Fiscal Year 2009)

Country	Access Requests Received By Foreign Affairs in Each Country	Unprocessed Cases at the End of the FY
United States	10,717	9,313
Australia	110	27
New Zealand	+ / - 200	0
United Kingdom	1,136	59
Mexico	1,595	--
Canada	665	229

A stark observation comes out of Table 11: Canada comes in second place, after the U.S., with regard to delays in processing directly submitted access to information requests.

In short, we have five countries with five access to information laws based on a similar model.²² They have comparable legislative systems that frame access to information, and like Canada, the countries being compared in this study all consult with foreign governments or international organizations.

²² Australia and the U.S. are currently putting their access to information legislation through a thorough review. Mexico and the United Kingdom have not yet completed the breaking-in period of their new legislation. Developments in all five countries considered in this comparison therefore warrant sustained monitoring.

FOREIGN CONSULTATIONS BY TARGET COUNTRIES

How do target countries meet the obligations imposed by their respective access to information laws with regard to international relations? Using this question as a framework, the next section provides a systematic comparison of procedures DFAIT developed since the 1982 legislation came into effect and the issue of a Treasury Board Secretariat directive on consultations.

This section provides an overview of legislative provisions and regulations that frame the handling of access requests likely to affect international relations in the five countries, followed by an examination of their consultation practices.

1. Legislative and regulatory framework

United States

The first exemption mentioned in the 1966 Act provides for the exclusion of documents relating to national security and foreign policy (Section 7, b, 1, A). The exemption is based on the security level attributed to this type of document and has been the subject of a great number of court rulings.

The concept of consultations is not specifically mentioned in the wording of the law; it is inferred from a logical interpretation of the first exemption. Similarly, there is no procedure or regulation that requires other government entities to consult the State Department or even direct to that department any access requests that might impact U.S. international relations.

Australia

Australia's 1982 legislation provides for special handling of documents that have an impact on international relations or relate to defence and national security issues (s. 33). Access to such documents is restricted if their disclosure risks damaging Australia's relations with another state or an international organization. The same restriction applies to documents confidentially obtained from another government or international organization. The legislation does not provide for any type of consultation with foreign governments or international organizations.

No procedures have been established requiring other departments or agencies to direct requests to the Department of Foreign Affairs and Trade (DFAT). Neither is there

any requirement to consult with that department when a requested document has an impact on Australia's foreign relations.

New Zealand

New Zealand's 1982 legislation included specific provisions on handling documents that have an impact on international relations or are related to defence or national security issues (s. 6b). Access to such documents is restricted if their disclosure risks damaging New Zealand's relations with another country or an international organization. The same restriction applies to documents confidentially obtained from another government or international organization.

The Ombudsman – or any other government entity – has not issued directives to other departments or agencies regarding the handling of access to information requests that might impact New Zealand's international relations. There is no obligation to consult the Ministry of Foreign Affairs and Trade (MFAT).

United Kingdom

Similarly to legislation enacted in most of the other countries, the United Kingdom's 2000 legislation (s. 27) stipulates that access to certain documents relating to international relations and national security may be refused.

An important provision of the legislation states that a minister may sign a certificate that "establishes" the existence of possible damage if a particular document were to be published, therefore restricting access and preventing the Commissioner from intervening.

Government departments and agencies who receive access requests governed by section 27 do not have a formal obligation to direct them to the Foreign and Commonwealth Office. However, in a recent note, the Ministry of Justice encouraged those entities to solicit an opinion before directly consulting with another government or international organization.²³

Mexico

Mexico's 2002 legislation provides for the exemption of documents that impact the Mexican government's international relations (s. 13). The exemption applies when the documents have been confidentially obtained from foreign governments or international organizations. The same obligation holds when requested documents risk damaging the development of Mexico's international relations.

²³ Ministry of Justice (2008). *Freedom of Information Guidance – Exemptions guidance*: Section 27: International Relations, London, 14 May: page 11.

There is no particular provision in the legislation that deals with exemptions relating to international relations issues. The question of foreign consultations is not mentioned in guidelines published by IFAI, or by any other government entity.

2. Consultation practices

Legal provisions and the regulatory context in place in each of the five countries compared provide a backdrop for the manner in which each country engages in consultations with foreign governments and international organizations.

United States

In the U.S., most consultations with foreign governments and international organizations are conducted by the State Department. That practice stems from that government department's experience on the subject and the complexity or sensitivity of the documents targeted by such an action.

Other government departments and entities also directly consult their foreign counterparts on occasion – nothing prevents them from doing so. It is up to officials responsible for access to information in each department or agency to decide whether they solicit State Department services and advice before taking action. For reasons of efficiency, such officials generally have considerable leeway in initiating foreign consultations.

As a matter of course, the State Department sends requests for consultation directly to the Washington embassy of the country concerned. The State Department engages in consultations with a good number of countries, including Canada. Such consultations are given relatively long deadlines, which are considered inevitable.

On the other hand, the Department also receives a number of consultation requests from foreign governments, Canada ranking first in that regard.²⁴

Australia

The Department of Foreign Affairs and Trade (DFAT) generates a certain number of consultations with foreign governments and international organizations.

²⁴ In 2008, DFAIT generated 77 of the 101 requests for consultation received by the State Department. In 2009, this proportion grew further: out of a total of 206 consultations, 172 came from Ottawa.

In other government departments and agencies, the decision on whether to consult Foreign Affairs regarding a specific request rests with the official responsible for access to information, with no other obligation than the exercise of prudence. In most cases, such departments and agencies communicate directly with their foreign counterparts.

Foreign consultations conducted or received by Foreign Affairs totalled 30 during 2008–09. Of that number, about ten came from the U.S., the United Kingdom and Canada.

New Zealand

The Ministry of Foreign Affairs and Trade (MFAT) may, on occasion, engage in foreign consultations despite there being nothing in the legislation or regulatory wording that compels them to do so. The decision is made according to the perceived need for such an approach or for reasons of diplomacy.

A significant number of other government entities, including the Prime Minister and the Cabinet, the New Zealand Security Intelligence Information, the New Zealand Police and the New Zealand Defence Force, engage in such consultations directly with foreign counterparts with whom they maintain contact. Such consultations take place outside the “diplomatic umbrella” of the Ministry of Foreign Affairs.

Year to year, New Zealand engages in few consultations with foreign governments. Similarly, it receives only a very few consultation requests from foreign countries.

United Kingdom

There being no formal requirement to do so, the unit responsible for the FOIA in the Foreign and Commonwealth Office engages in few consultations with foreign governments and international organizations. Such consultations take place only if the Department agrees to release the document and wishes to obtain, for diplomatic reasons, the agreement of the foreign government concerned.

The Foreign Office opts in favour of efficiency in its consultations in the express hope that FOIA deadlines will be met. It will therefore intervene directly with the foreign country’s embassy or high commission in London or use traditional diplomatic channels through its diplomatic mission in the country concerned by the request.

Similarly, some government departments and agencies engage in this type of consultation when deemed appropriate. In respect of “good practices” favoured by the Ministry of Justice, they occasionally request an opinion of the Foreign and Commonwealth Office.

Since the FOIA became effective in 2005, foreign consultations have been few; conversely, the Ministry receives a limited number of consultation requests from foreign governments.

Mexico

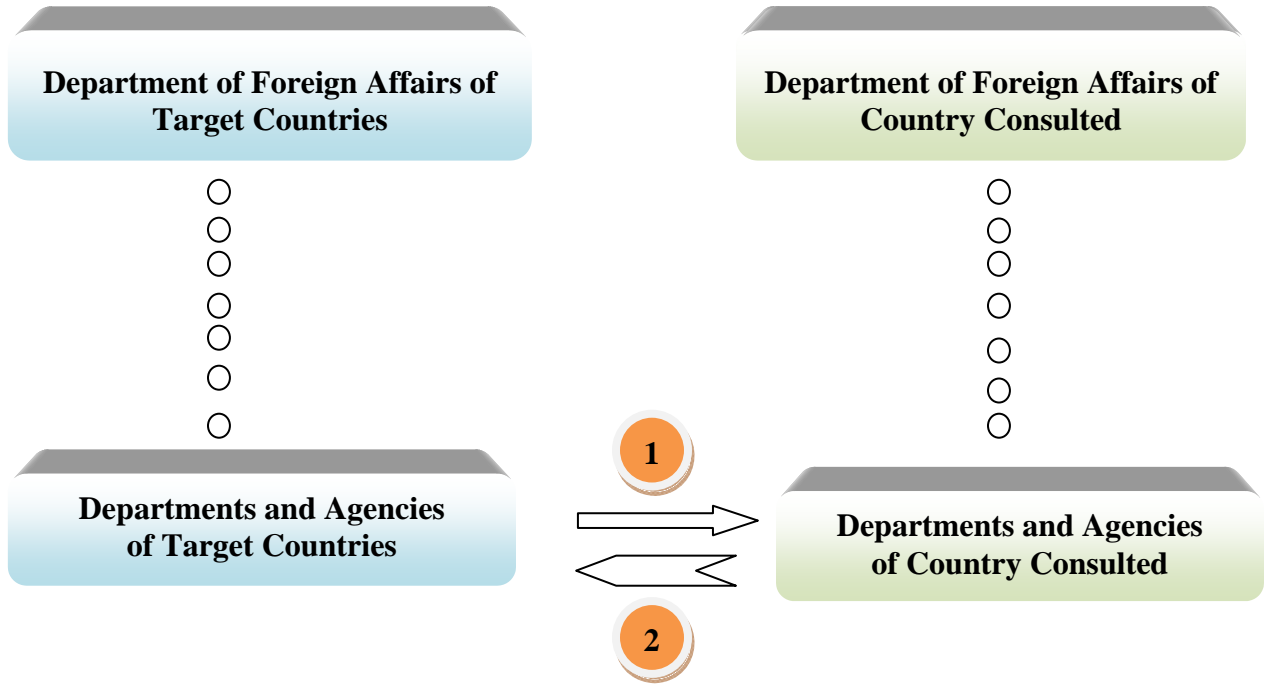
In Mexico, consultations with foreign governments or international organizations are infrequent. While the legislation does not require it, prudence may occasionally bring the *Secretaria de Relaciones Exteriores* (SRE) to engage in such an initiative.

Other units of the federal government may also approach their usual contacts regarding access requests that concern them. For its part, the SRE does not get involved unless the document in question or its content directly concern the Department's mandate.

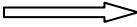
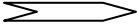

The number of foreign consultations is very small and the SRE receives few consultation requests from foreign countries or international organizations.

In short, because there are no provisions in their respective access to information legislation that specifically refer to foreign consultations, all five countries in this comparison study follow similar procedures. In each case, the government department or agency that receives an access request that may impact international relations directly contacts the foreign counterpart concerned by the request (Figure 2). This procedure does not exclude the possibility that the foreign affairs department will be consulted beforehand.

FIGURE 2
Process for Consultations with Foreign Governments by
Target Country Government Departments and Organizations



Legend:

-  Initial consultation
-  Result of the consultation
-  Opportunity to consult

FINDINGS AND COMPARISON

Some clear observations may be drawn from this summary of the legal framework and procedures for consultations with foreign governments and international organizations by target countries.

Consultations were adjusted to get a real sense of the implicit requirement contained in the legislation of the five countries and Canada with regard to international relations. Nothing is specifically spelled out in the wording of the legislations.

Consultations are conducted in each of these countries, but to significantly varying degrees, going from the first-ranked U.S. and Canada, to New Zealand, the United Kingdom and Mexico who initiate very few.

In the U.S., consultations with foreign governments are many, reaching several hundred every year by estimates of the branch responsible for implementing the FOI Act. The consultation procedure is used only if documents have not been assigned security classification in accordance with a very specific “executive order.”²⁵ On the other hand, contrary to the Canadian *Access to Information Act*, the *Freedom of Information Act* does not allow refusal to disclose a document obtained from a foreign government solely because it was obtained confidentially – it must also be classified for reasons of national security.²⁶

Consultations initiated by Australia and New Zealand, where this practice is seldom used, mainly concern consular documents, which are often governed by that country’s privacy legislation. In Mexico, data is not gathered on the subject due to the leeway that is given to government departments and agencies in that regard. Finally, in the United Kingdom, consultations with foreign governments are few and far between. The access to information legislation directorate in the Foreign and Commonwealth Office initiates consultations only if disclosure of the document requested is blocked. Such consultations are decided on a case-by-case depending on the public interest the document may have.

Canada is the only country to have a precise and restrictive directive on the subject, developed more than 17 years ago by the Treasury Board Secretariat, imposing the consultation process on both the Department of Foreign Affairs and International Trade and all government departments and agencies. It is a blanket rule that applies to access requests likely to have an effect on relations between Canada and another country.

In all countries briefly examined in this study, such consultations may be initiated by a variety of stakeholders in government departments and agencies, starting with the

²⁵ Executive Order 13256 on Classified National Security Information.

²⁶ Letter from Nicholas Mulville Murphy, Senior Advisor, Office of Information Programs and Services, (State Department), August 23, 2010.

department of foreign affairs. Canada is the only country that does not allow its departments and agencies to directly contact foreign counterparts or colleagues.

These findings are illustrated in Table 12.

TABLE 12
Basis and Conditions for Foreign Consultations between
Target Countries and Canada

Country	Consultations Initiated			
	Under the Access to Information Legislation	According to a Government Directive	By Foreign Affairs	By Departments/ Agencies
United States	No	No	State Department	Yes
Australia	No	No	Department of Foreign Affairs and Trade	Yes
New Zealand	No	No	Ministry of Foreign Affairs and Trade	Yes
United Kingdom	No	“Guidance” ²⁷	Foreign and Commonwealth Office	Yes
Mexico	No	No	<i>Secretaria de Relaciones Exteriores</i>	Yes
Canada	No	Yes (TBS)	DFAIT	No

²⁷ On simple recommendation by the Ministry of Justice, without any restrictions.

AVENUES FOR CONSIDERATION

Foreign consultations relating to access to information requests raise a series of legal and sometimes diplomatic issues. As far as DFAIT is concerned, foreign consultations put a strain on the Department's overall performance because they add significant delays to the processing of access to information requests.

Before this study was launched, the following question set the stage for a comparative look at how five countries handle consultations with foreign governments and international organizations. Can avenues be identified to help DFAIT improve its process?

Two points need to be made before responding to the question.

First, it should be noted that this research concerns only foreign consultations; it sets aside other initiatives grouped under the same label that may be undertaken by any of the Department's directorates, including the Access to Information Branch. Such internal initiatives may, or may not, end up being included in the foreign consultation process.

Secondly, it is also important to keep in mind the very specific character of these consultations, which are part of the dialogue between countries, as well as the fact that they necessarily rely on diplomatic practices and style. As such, diplomats must think twice before following up with the foreign affairs department of the host country regarding a case that is languishing.

This structured study of the processes and procedures used by the five reference countries results in two proposed avenues to consider in order to alleviate the problem DFAIT has been facing over the past several years.

(1) The first avenue concerns the **technical side of the consultation process**, once the principle of such an initiative has been established by DFAIT. Similarly to what is done by other foreign affairs departments, consultation officials at DFAIT, in cooperation with their foreign missions, should identify the best gateway for soliciting consultations with other countries. Are normal channels through the foreign affairs department of the country concerned always preferable? In some cases, the answer is clear given traditional practices and the reciprocity that has developed in this very specialized dialogue.

Otherwise, would it not be more efficient to direct such requests through the country's embassy located in the nation's capital? The question warrants consideration in the case of countries to which access requests have yet to be directed or which have received very few such requests in recent years. Such an approach could enhance relations between DFAIT and the embassies in question and may even produce unexpected dividends.

On a more basic level, the Department would also gain by expediting document handling procedures, using its missions to direct consultation requests to foreign affairs departments of the country concerned. To reduce delays and depending on the destination, the possibility of sending documents by the fastest and most frequent diplomatic pouch should be examined. That would be a clear demonstration of DFAIT's interest in this aspect of diplomatic duties.

Given the ever-increasing volume of reciprocal access to information consultations between Ottawa and Washington, it might be useful to streamline procedures currently in place. Access to information officials at the State Department and at DFAIT would benefit from initiating discussions in that regard.

(2) The second avenue to explore involves a more thorough examination of **DFAIT practices over the past twenty years and the principles underlying consultations with foreign governments**. The Department of Foreign Affairs and International Trade is solely responsible for engaging in consultations with foreign governments and international organizations. Traditional diplomatic practices and the mandate conferred by the Treasury Board Secretariat regarding consultations have solidly anchored this way of doing things.

In light of information gathered from practices in four of the countries in this comparative study, this issue warrants review. Similarly, increased specialization in various spheres of international relations – including access to information – provides a basis to question what was yesterday considered a certainty. Globalization does not only concern trade and the economy; it involves a great number of stakeholders who turn the wheels of international life at various levels.

It might therefore be useful to allow some departments or agencies to initiate foreign consultations under pre-determined conditions. Particularly concerned would be departments that maintain significant and sustained contact with foreign counterparts in government departments or international organizations through well-established ties and in accordance to procedures.

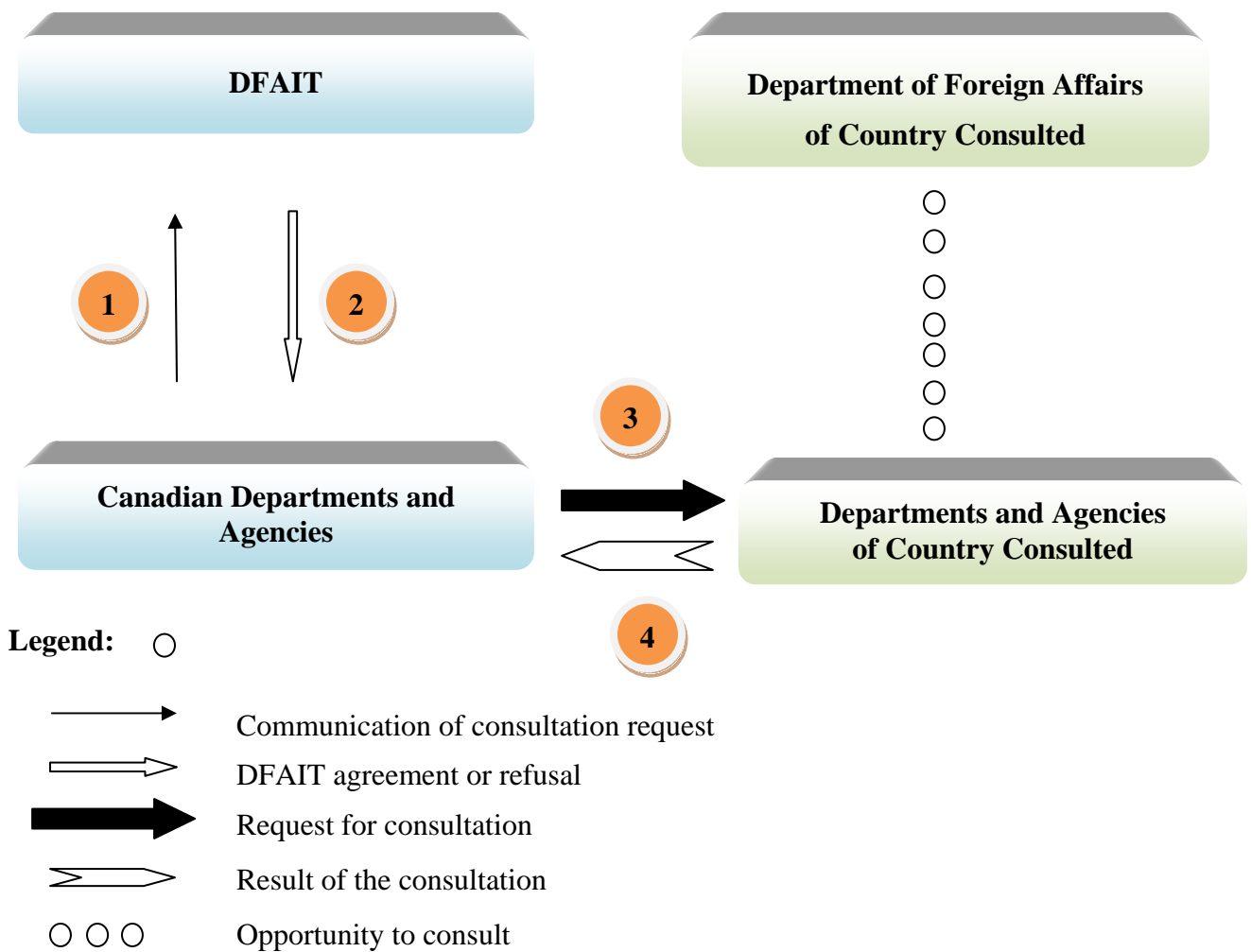
Such streamlining would in fact match one of the options considered some time ago by the Treasury Board Secretariat with regard to such initiatives by very specific entities: “Only when an established and acceptable system of liaison and consultation already exists should direct consultation take place. External Affairs should be kept informed of these channels of consultation.”²⁸ The Ministry of Justice in the United Kingdom, which plays a similar role to that of the Treasury Board Secretariat with regard to access to information, has adopted the same principle by publishing its “guidance” on international relations issues.²⁹

²⁸ Treasury Board Secretariat (1993). *Mandatory Consultations (Information and Privacy Policy)*, Ottawa, December 1 (Section 9: Consultation).

²⁹ Ministry of Justice (2008). *Freedom of Information Guidance – Exemptions Guidance – Section 27: International Relations*, London, 14 May, page 11: “The advice of FCO officials should normally be sought before you consult foreign governments or international organizations about the disclosure of

A two-tier procedure might be considered for a department or agency to directly engage in consultations. It should first establish for DFAIT the nature and strength of the ties maintained with its foreign counterparts. When an access request is received, the department or agency could provide DFAIT with the wording of the proposed foreign consultation and the rationale behind the anticipated decision. DFAIT would then have ten working days to issue its comments and suggestions, or even an outright refusal. (Figure 3).

FIGURE 3
Proposed Consultation Process with Foreign Governments by
Canadian Government Departments and Agencies



information, although on subjects where other public authorities have well-established international relationships it may be sufficient to keep FCO officials informed.”

This procedure preserves DFAIT's right to ultimately review requests and borrows from practices in four of the five countries studied in this comparison. Such an approach would streamline the consultation process and avoid delays incurred when documents are sent back and forth between foreign affairs departments in the two countries concerned. It would also considerably shorten lengthy delays under the current system, therefore reducing departmental and agency grumbling about DFAIT.

This discussion should involve both DFAIT and the Treasury Board Secretariat in view of the latter's responsibilities relating to *Access to Information Act* implementation.

The Information Commissioner should also be involved in weighing these options due to their international dimension. She could consider calling on her counterpart commissioners in other countries to study this issue and, in so doing, possibly jumpstart the move towards a common framework that would harmonize and streamline foreign consultations.

These proposals do not affect internal DFAIT procedures. Reviewing various aspects of a request for access (sent directly to DFAIT or through a department or agency) that impacts Canada's international relations constitutes a considerable burden for DFAIT.

Again, these avenues and suggestions concern only the international dimension of consultations initiated on behalf of federal government departments and agencies. They could result in measures that lighten DFAIT's burden related to determining the impact that a request for access could have on Canada's international relations. Finally, such streamlining would no doubt enable departments and agencies to respond more quickly to requests for access to documents that may have international ramifications.

The overarching goal of these possible steps is to ensure that citizens have access to requested documents within a reasonable amount of time and in accordance with the provisions and spirit of the 1982 Act. The proposed options are in keeping with the objectives expressed by the Department in its response to the report published by the Information Commissioner a few months ago.

APPENDIX

ACCESS TO INFORMATION REGULATIONS OF TARGET COUNTRIES

The following is an overview of fundamental characteristics of the legislation and regulations governing access to information of the countries selected for this comparison.

United States

In 1966 and long after Sweden³⁰ did so, the U.S. adopted the *Freedom of Information Act* (5 U.S.C. # 552), which inspired almost all access legislation later enacted throughout the world. Finland pioneered the movement in 1951. The phenomenal development of the machinery of government at the time of the New Deal, the proliferation of secrecy in administrative activities during World War II and the Cold War led Congress to turn the page and encourage this effort toward transparency. The FOIA, acronym adopted by most public administrations, has in fact served as a basis for legislation later implemented in the West, Oceania and, finally, on all continents.³¹

The American access to information legislation was profoundly reworked in 1974. It has gone through various periods where attempts to increase transparency alternated with sometimes brutal efforts to stop the trend. George W. Bush's administration was notable for the implementation of a series of obstacles justified by the fight against terrorism. As soon as President Obama entered the White House, he had the *Open Government Act of 2007* enacted. Since then, a whole series of measures and innovations have given concrete expression to the President's wish to encourage a culture of transparency throughout the machinery of government using new information and communications technologies.³²

According to the Act, any person, whether corporation or private individual, may exercise the right to access federal administration documents, including any documents produced by agencies, departments and entities in the machinery of federal government.

American legislators did not set out an administrative or quasi-legal mechanism to settle disputes relating to refusals to disclose documents by any component of the federal structure. Beyond a simple administrative review, the author of a request must go to court

³⁰ Comeau, Paul-André (2006) - "Accès à l'information : perspectives internationales," Barreau du Québec (Service de la formation continue), Cowansville, Éditions Yvon Blais: p. 38.

³¹ The most recent listing of countries having enacted legislation on access to information is dated 2008. It is the work of Roger Vleugels – *Overview of all 86 FOIA Countries*: <http://right2info.org/laws/Vleugels-Overview-86-FOIA-Countries-9.08.pdf>

³² Davies, Alysia and Dara Lithwick (2010). *Government 2.0 and Access to Information: 2. Recent Developments in Proactive Disclosure and Open Data in the United States and Other Countries*, Ottawa, Library of Parliament, April 15, p. 1 – 5.

in the hope of having the refusal to disclose reversed, either in total or in part, under the provisions of the *Freedom of Information Act*.

The Department of Justice plays the role of legal advisor to all entities subject to U.S. access legislation. With the publication of the *Freedom of Information Act Guide*, the Department explains the provisions of the Act for the benefit of officials responsible for its implementation.

Australia

Australia's Parliament adopted *The Freedom of Information Act* in 1982. The legislation has since undergone a number of changes and has only recently been profoundly reworked.³³ It is nevertheless from the 1982 legislation, which is still in force, that useful information was collected for this study.

Any "person" may request access to public administration documents as well as any personal information concerning him or her that are held by any political or administrative entity.

In cases of unsatisfactory response or dispute, the author of a request must first ask the government department or agency concerned to reconsider the decision. Thereafter, the individual may submit a request to the Administrative Appeals Tribunal, whose decisions may be appealed to the federal court and, finally, to the High Court. Outside this process, the Ombudsman may be asked to intervene.

The 1982 legislation targets all government departments and agencies. Courts are also subject to the Act with regard to administrative issues.

In recent years, the unit responsible for implementing the Act and promulgating directives and advice has been installed within the Prime Minister's Cabinet. The entity is under the authority of the Cabinet Secretary and Special Minister of State to the Parliament on the Operation of the Act.

New Zealand

New Zealand is one of the small group of countries that implemented a system governing access to information in the early 1980s. The *Official Information Act* was adopted by its Parliament in Wellington in 1982.

Only citizens and permanent residents as well as companies established in New Zealand may exercise the right to access the administration's documents.

³³ Davies Alysia and Dara Lithwick – See note 17: pages 8 – 12.

The Ombudsman's office, which comprises a group of individuals, is responsible for settling any disputes in addition to fulfilling other duties. The recommendations of the Ombudsman may be appealed to higher courts.

The legislation covers practically the entire public system, from central ministries to cities and municipalities, and concerns all documents produced and held in government offices.

The original law had established an "Information Authority" whose mandate was to promote access to information and support government departments and agencies; this institution was abolished in 1988. Since then, the Ministry of Justice has been responsible for developing and distributing document listings but does not play an overall role similar to that of Canada's Treasury Board Secretariat.

Finally, the Ombudsman offers advice to government departments and agencies in published information documents intended for individuals looking for a particular document as well as guides to facilitate the work of government officials responsible for handling access requests.

United Kingdom

The United Kingdom enacted access to information legislation in 2000 following long internal debate and numerous consultations with other countries in the Westminster system, including Canada. It was the fulfilment of an old electoral promise made by the Labour Party that had been put aside at the end of the 70s when Margaret Thatcher took office.

This legislation gives everyone access to the administration's documents, without any particular restrictions such as citizenship or residence.

The 2000 legislation came into force in January 2005 and concerns almost all the United Kingdom's public sector, except for Scotland. It also includes the two Houses of Parliament, as evidenced by the "expense claim scandal" that dogged members of Parliament just last year.

With the adoption of the Act in 2000, the Westminster Parliament divided related responsibilities and mandates between two government departments and created two new entities.

(1) Parliament established the position of Information Commissioner under the authority of the Minister of Justice, who also publishes statistics on the processing of access requests by all government offices.

The Commissioner of Information is mandated to ensure the respect of both the access legislation and the *Data Protection Act*, 1998 being its latest version.

The Commissioner of Information settles disputes resulting from the legislation's implementation by officials responsible for the task in various government departments and agencies. His decision-making power is enforced with the issue of "notices" after he has received and studied a case.

(2) The Commissioner of Information's decisions may be appealed to the Information Tribunal, created by the same legislation. Also included in the Act is the possibility of appealing decisions rendered by that Tribunal before the High Court of Justice.

The Secretary of State is responsible for developing and distributing a code of practice to government offices in order to provide guidance in processing access to information requests.

Finally, the Ministry of Justice, created in 2007 and placed under the authority of the Lord Chancellor, is responsible for developing a code of practice on document management, from production to destruction, for the files and records produced by the public administration and agencies targeted by the legislation.

Mexico

The Mexican federal state passed access to information and privacy protection legislation in 2002. This law established the proactive disclosure of a considerable number of documents.

Anyone may exercise the right to access documents held by any component of government, including Parliament and the judicial system.

The Mexican system of access to information and privacy protection is under the authority of the Instituto Federal de Acceso a la Información (IFAI), composed of five commissioners.

The IFAI carries out all mandates related to access to information and privacy legislation, including dispute settlement, and renders its decisions in public hearings. Decisions may be appealed to federal courts, but only the original requestors may pursue this option; the IFAI's decisions against government departments and agencies are final.

The IFAI is responsible for applying the law throughout the federal political system. It has the mandate to enact implementing regulations relating to the legislation and establish standards on document classification.³⁴

³⁴ IFAI assumes responsibilities similar to those born by the Canadian Treasury Board Secretariat.

BIBLIOGRAPHY

Delagrave, Andrée (2009). *Access to Information and Privacy in the Department of Foreign Affairs and International Trade – Improving performance through strengthened capacity*, Ottawa, Sussex Circle, 36 pages.

Department of Foreign Affairs and International Trade (2006). *Status Report on the 2005 Report Card*, Ottawa, 6 pages.

Department of Foreign Affairs and International Trade (2008). *Overall Performance in 2007 – 2008*, Ottawa, 11 pages.

Department of Foreign Affairs and International Trade (2009). *Annual Report to Parliament on the Administration of the Access to Information Act 2008 – 2009*, Ottawa, 10 pages.

Department of Foreign Affairs and International Trade (2010). *Annual Report to Parliament on the Administration of the Access to Information Act*, Ottawa, online document: http://www.international.gc.ca/about-a_propos/atip-aiprp/parl0809_atia_lai.aspx?lang=eng
Page consulted June 6, 2010.

Information Commissioner of Canada (2007). *Report Cards on the Performance of Department of Foreign Affairs and International Trade (2005 – 2006)*, Ottawa, 53 pages.

Information Commissioner of Canada (2010). *Out of time (Special report to Parliament)*, Ottawa, 150 pages.

Ministry of Justice (2008). *Freedom of Information Guidance – Exemptions Guidance – Section 27: International Relations*, London, 14 May, 16 pages. Page consulted July 7, 2010.

Treasury Board of Canada Secretariat (1993). *Mandatory Consultation (Information and Privacy Policy) - Section 9: Consultation* Ottawa, December 1. online document: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13770§ion=text>

LIST OF TABLES

Table 1	Page 14
Relative Weight of DFAIT's Foreign Consultations in the Administration of the <i>Access to Information Act</i> (2008–09)	
Table 2	Page 15
Relative Weight of DFAIT's Foreign Consultations in the Administration of the <i>Access to Information Act</i> (2009–10)	
Table 3	Page 16
Consultations in 2008–09 by DFAIT with Various Countries on Behalf of Canadian Departments and Agencies	
Table 4	Page 17
Consultations in 2009–10 by DFAIT with Various Countries on Behalf of Canadian Departments and Agencies	
Table 5	Page 18
Consultations by DFAIT with International Organizations on Behalf of Departments and Agencies in 2008–09 and 2009–10	
Table 6	Page 19
Consultations with Various Countries Following Access Requests Received by DFAIT	
Table 7	Page 20
Consultations with International Organizations Following Requests Received by DFAIT	
Table 8	Page 21
Average Length of Time Taken to Receive Files Submitted to Foreign Countries on Behalf of Other Departments and Agencies (2008–09)	
Table 9	Page 21
Average Length of Time Taken to Receive Files Submitted to Foreign Countries on Behalf of Other Departments and Agencies (2009–10)	
Table 10	Page 22
Consultations by Various Countries with DFAIT	
Table 11	Page 25
Access to Information Requests (Fiscal Year 2009)	
Table 12	Page 33
Basis and Conditions for Foreign Consultations between Target Countries and Canada	

LIST OF FIGURES

Figure 1 **Page 13**
Steps in Consultations Conducted by DFAIT with Foreign Governments on Behalf of
Departments and Agencies

Figure 2 **Page 31**
Process for Consultations with Foreign Governments by Target Country Government
Departments and Agencies

Figure 3 **Page 36**
Proposed Consultation Process with Foreign Governments by Canadian Government
Departments and Agencies